No. 14-9605
Consolidated with No. 14-9613

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 627,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and STACY M. LOERWALD,
Respondents.

IUOE, L. 627'S BRIEF ON CROSS-APPEAL

IUOE, L. 627'S PETITION FOR REVIEW OF DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD/NLRB'S CROSS-PETITION FOR ENFORCEMENT

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GLOSSARY

ALJ Decision - As referred to herein, the pages and lines are found at the version of the ALJ Decision in the Agency Record filed herein on 1/5/15, Vol. III, Item 1.

OWL - "Out of Work List" - when a bargaining unit member is out of work and desirous of referral for employment to a new job, she requests placement on the OWL. The person is placed at the end of the list. When a new job opening becomes available, the Union goes down the list in order, calling those who meet the job qualifications, until the job is filled. The person who takes the job is removed from the list, to be added back on after the job is over and she requests to be added (to the bottom of the list), starting the cycle over.

ULP - "Unfair Labor Practice", as defined in 29 U.S.C. § 158(a) and (b).

PRIOR OR RELATED APPEALS

Case No. 14-9605 is a petition by IUOE, L. 627 for review of an NLRB decision. Consolidated with that is a cross-application by the NLRB for enforcement of its order in the case, which is Case No. 14-9613.

Other than as above, there are no related appeals known to IUOE, L. 627.

The prior appeals are Nos. 13-9547 and 13-9564.

STATEMENT OF ISSUES PRESENTED

1. Whether the NLRB Decision and Order is supported by the law and the evidence.
2. Whether enforcement of the NLRB Decision and Order should be denied where it is not supported by the law and the evidence.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 627,	)	
Petitioner,	)	
v.	)	Case No. 14-9605 (Consolidated with 14-9613)
NATIONAL LABOR RELATIONS BOARD and STACY M. LOERWALD,	)	
Respondents.	)	

BRIEF-IN-CHIEF OF PETITIONER

FACTS

Loerwald is a member of the Union, IUOE, L. 627, which operates a hiring hall. ALJ Decision, p. 2, lines 21-36; P. 5, lines 11-12.[1] The relationship between the two has been strained. ALJ Decision, p. 5, lines 16-19. Loerwald filed charges on multiple occasions against her Union for discrimination/retaliation under Title VII and filed multiple lawsuits with regard thereto. And, although there had been friction from EEOC charges and otherwise dating back to 2009, the Union continued to refer Loerwald for employment into the Fall of 2011. The Union referred

[1]The page and line references to ALJ Decision are found in the version in the Agency Record filed herein on 5 January, 2015, Vol. III, Item 1.

Loerwald to the Deep South Rigging Project, but she could not pass the background check.[2] ALJ Decision, p. 5, lines 23-33. By September 28, 2011, the Union had referred five people, including Loerwald, to work for Northwest Crane at the Koch Refinery. ALJ Decision, p. 6, lines 2-10. Again, refinery work often excludes felons. Northwest Crane did not follow the contract because ultimately it only wanted three people, but had requested a referral of five. However, this was unknown to the Union until later. General Counsel Exhibit 3, pp. 31-32.

In the Fall, 2011, due to these two apparent mis-communications, Loerwald unilaterally implemented a communication-in-writing-only policy from the Union to her. ALJ Decision, p. 6, lines 14-18. This applied only one way–Loerwald continued to communicate with the Union orally, tape recording numerous conversations. ALJ Decision, p. 6, line 20; p. 7, lines 18, 25, 33; p. 8, line 39; p. 9, lines 7, 13, 36, 39-40; p. 10, lines 1, 5.

[2]Loerwald is a felon. Tr., p. 126. Employers often exclude workers who have felonies. Tr., pp. 126-127, 261.

On November 7, 2011, the Union removed Loerwald from its OWL[3] because Loerwald did not maintain a working phone number so that she could be contacted when there was work. ALJ Decision, p. 8, lines 4-22. This was told her directly. General Counsel Exhibit 16, p. 5. This was also communicated by the Union's attorney to her attorney.

Although over the course of the next several months Loerwald was at the Union hall on a regular basis and had conversations with Union officials (many of which were recorded), and although Loerwald knew that her name was not on the OWL, and although Loerwald knew that she could get her name back on the OWL merely by saying so and giving a working phone number, Loerwald made no attempt to get her name back on the OWL. Tr. pp. 17, 21-22, 143.

Rather, Loerwald filed a ULP[4] charge against the Union. A hearing was held before an administrative law judge who determined that Loerwald was improperly removed from the OWL on November 7, 2011, and ordered a remedy of back pay of unspecified amount. ALJ Decision,

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[3]Out of Work List. This is the list of union "members" who are out of, but seeking, work. When a union member goes out of work, she can call and ask that her name and phone number be added to the OWL. It is then added to the bottom of the list. The person works her way up to the top of the list as those ahead (who were put on the list before) get employment and are removed from the list.

[4]Unfair Labor Practice. See 29 U.S.C. § 158(b).

p. 13, lines 24-27; p. 24, lines 4-6. The Union filed exceptions with the NLRB. Agency Record, filed herein on 1/5/15, Item 5. The NLRB, through a panel consisting mostly of purported recess appointments, upheld, as modified, the ALJ Decision, without analysis of the Union's exceptions. On petition to this court the NLRB decision was vacated and remanded, under *NLRB v. Noel Canning,* 573 U.S. __,134 S.Ct. 2550, 189 L.Ed.2d 538 (2014). On further consideration the NLRB re-affirmed its prior decision, again without analysis of the Union's exceptions. Appendix hereto, pp. A-1 through A-3.

The Union commenced this proceeding to review the NLRB determination; the NLRB has counter-petitioned for enforcement.

ARGUMENTS AND AUTHORITY

SUMMARY OF ARGUMENT

What started as friction between Loerwald and the Union was compounded by mis-communication. But, ultimately, Loerwald knew that her name had been removed from the OWL and knew how to get it back on, but made no attempt to do so or to give a working phone number until the following summer when she was put back on the OWL, choosing rather to file an NLRB charge, hoping that it would be all someone else's fault and she could get paid for not working.

PROPOSITION I: The Factual Findings and Legal Conclusions of the ALJ/NLRB Are Unsupported.

The standard of review over an NLRB order is: the appellate court grants enforcement of an NLRB order when the agency correctly applied the law and its findings are supported by substantial evidence in the record as a whole. *NLRB v. Velocity Express, Inc.,* 434 F3d 1198 (10th Cir. 2006). Substantial evidence relates to whether reasonable conclusions were drawn from the evidence submitted, giving consideration to conflict in the evidence. *Universal Camera Corp v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The issues in this proposition were raised in the NLRB in the Exceptions to Decision of ALJ and ruled on (without analysis) in its Decision and Order.

The Union in the Fall of 2011 referred Loerwald to the Deep South Rigging job. The ALJ seems to blame the Union that Loerwald did not get that job. ALJ Decision, p. 5, lines 23-33. However, Loerwald knew that she was a felon, that the work was to be within a refinery, and that it is not the Union that does the background check or chooses people, but rather the company. Tr. 126-128, 226-227, 261. At most, there was here an unintentionally raised expectation that did not pan out. The ALJ Decision notes that mistakes are not ULPs. ALJ Decision, p. 14, lines 25-26.

At p. 5, lines 23-34, of the ALJ decision, the ALJ finds that Loerwald was told by the Union that she had passed the background check, but she admits that the Union officer said he was waiting on a fax from the employer as to whether or not Loerwald had cleared the background check–not that she had. In General Counsel Exhibit 8, pp. 5-7, Loerwald said, "When you get that [a fax as to who passed], call me and let me know **if** I'm on it." (Emphasis added.) At p. 7, Business Manager Stark says he was there and heard what the Union agent said and that was that she was on the approved list to go to the employer, not on the passed-background list. This basis, mis-statement by the Union which raised Loerwald's hopes, is not true and therefore cannot be the basis of a discrimination finding.

Another of Loerwald's complaints against the Union was Northwest Crane's request for five workers (of which Loerwald was one sent by the Union), but only hiring three (which did not include Loerwald). However, it was not just Loerwald who was disturbed by this, as the ALJ Decision seems to say at p. 6, lines 2-10, but also the Union. As the ALJ notes in her Decision at p. 2, lines 26-30, the prior administration had let employers get away with things that the new administration was not going to allow. Accordingly, when the Union found out that the

employer had asked for five employees, but only took three, the Union was disturbed as well. The Union representative, Farris, responded to the news, "Well, I'm not going to fly with that." General Counsel Exhibit 3, p. 31. He also said, "I'm not real cool about them ordering five so that he could pick three. I'm not cool about that....I think they hit me blindside with that...but it'll change. That's going to change, because Perry [another business agent] feels the same way. We talked about it." General Counsel Exhibit 3, p. 31. And then, in the same exhibit at pp. 31 and 32, Farris, the business agent, agrees with Loerwald that if they order five, they need to take them and that they were not going to allow employers to pick and choose and sift through. Farris says that he is not going to let that happen again, despite the fact that he was blindsided. General Counsel Exhibit 3, p. 32. Notwithstanding, Loerwald did not file a grievance against the company. Tr. 129. This is not evidence of discrimination by the Union.

The ALJ Decision at p. 7, lines 25-31, discusses a conversation between Loerwald and Farris on October 20, based upon Loerwald's memory of the conversation. However, as the ALJ states, the conversation was secretly recorded by Loerwald and a transcript is in evidence–General Counsel Exhibit 7, p. 3. Farris asked Loerwald if she

wanted to know where she was on the list and she answered affirmatively and that she wanted to see that. At line 11 he shows her the list, with her name in the same spot. She never asked him to see any more of the list than that, but later complained (outside his presence) that he had not. General Counsel Exhibit 7, p. 3. This is a "gotcha" moment indicative of what Loerwald's true incentive was. It is not evidence of discrimination by the Union.

When Loerwald removed her phone number from the OWL, the Union did point out to her that there would be no way to contact her for work purposes. ALJ Decision, p. 6, lines 25-29. Indeed, the rules required a working phone number for notification. General Counsel Exhibit 9, p. 2, last 3 lines. This contradicts the ALJ's conclusion that Loerwald would not know she was out of compliance with OWL procedures. ALJ Decision, p. 7, lines 1 & 2. Also, to the extent the ALJ Decision relies upon this for a conclusion of discrimination in Loerwald not getting work, the evidence is that the Union uniformly told people they had to have a phone number; also, it discussed jobs with Loerwald when she would come in, but she turned them down. Tr. 257, 261.

The ALJ finds in her Decision at p. 7, lines 18-23, that the only contacts between Loerwald and the Union would be in writing and with

bona fide job offers, but then notes in her Decision at p. 7, line 25; p. 7, line 33; p. 8, line 39; p. 9, line 6; p. 9, line 13; p. 9, line 36; and p. 10, line 1, a number of contacts between Loerwald and the Union outside of this limited process. There is no authority cited for the proposition that a member can unilaterally implement a one-sided-only, in-writing-only policy. Nor is there any evidence that the Union allowed anyone to communicate in-writing-only, so as to invoke *Mesker Door, Inc.,* 357 NLRB, No. 59 (2011), as the latest NLRB Decision and Order attempts. The ALJ ruled that all correspondence about the OWL should have been through the lawyers, because Loerwald wanted no direct contact with the Union, despite, as shown above, 13 contacts by her to it after that time. There is no authority cited for this extraordinary conclusion that all contact must be through the lawyers.

Even after Loerwald said that she would have no more direct oral contact with the Union, she went into the Union Hall and talked to Union operatives on October 14 (ALJ Decision, p. 6, line 20); October 17 (ALJ Decision, p. 7, line 18); October 20 (ALJ Decision, p. 7, line 25); November 2 (ALJ Decision, p. 7, line 33); November 11 (ALJ Decision, p. 8, line 39); November 23 (ALJ Decision, p. 9, line 7); November 30 (ALJ Decision, p. 9, line 13); December 5 (ALJ Decision, p. 9, line 36);

December 14 (ALJ Decision, p. 9, line 36); January 4 (ALJ Decision, p. 9, lines 39-40); January 4 (ALJ Decision, p. 9, lines 39-40); January 10 (ALJ Decision, p. 10, line 1); and January 17 (ALJ Decision, p. 10, line 5). On none of these occasions did Loerwald make any attempt to give the Union her working phone number or re-register to be put on the OWL, even though she had been with the Union several years and knew how to register. Tr. 17, 21-22, 143. The only feeble attempt to do that was apparently a letter in mid-November counsel-to-counsel that did not come to the attention of the Union. General Counsel Exhibit 14. This is despite the fact that Loerwald knew the whole time that she was not on the OWL, because she had taken her number off; she was told on November 30th that she took herself off. General Counsel Exhibit 16, p. 5 and ALJ Decision, p. 9, lines 24, 25 and 40. She also knew on January 4, when she went in, that her name was not on it. ALJ Decision, p. 9, pp. 45-46. Yet she never asked to be put back on.

The ALJ finds that taking Loerwald off the OWL was retaliatory because it was done immediately and one other person (out of 200 or so) remained on the list for some time until being removed, despite Union Business Agent's repeated notes that the person should be removed (and the secretary did not follow instructions). ALJ Decision,

pp. 16 and 17. The ALJ's interpretation misrepresents the facts on several points. First, Loerwald knew on October 14 that there was no way to contact her. General Counsel Exhibit 3, p. 3. Similarly, Weant, the other person who should have been removed, could not be contacted without a number, effectively taking him off the contact list, whether his name stayed there or not. Tr. 258-259.

Third, the ALJ complains that Weant was treated differently when his removal took time (even though the effect was the same; see paragraph above), even though the Union officers wrote several times that the name should be removed, but the secretary was slow in doing that. Tr. 235-236, 240-242, 262. The ALJ notes that "occasional negligent mistakes" do not give rise to a ULP, but then finds enemy action in what appears to be nothing more than sloppy clerical work. ALJ Decision, p. 14, lines 25-26. Finally, the ALJ finds that Loerwald removed her number from the list on October 14, but her name was not removed until November 7. ALJ Decision, p. 16, lines 12-13. This indicates that the administrative task of physical removal did take some time.

The ALJ also finds enemy action against Loerwald in the Union's attempt to more closely follow its own rules after the August, 2000, election. ALJ Decision, pp. 15-22. The ALJ relies upon the testimony of a

prior administration person, Jan Coleman, that they had never followed the rules before. ALJ Decision, p. 4, lines 19-12; p. 16, lines 28-35. But the evidence is undisputed that the new administration was tasked with following the procedures more closely and that it did so, generally and across the board, not as an attempt to "get" Loerwald. Tr. 204-205, 207-208, 210-212.

The ALJ Decision faults Business Manager Stark for not showing Loerwald the OWL. ALJ Decision, p. 11, lines 20-24. But the Business Agents (not Manager) have the list because they work off that list; Stark did not have it to show. Tr. 221, 226, 228. Also, since Loerwald was off the list and knew that fact, then the rationale for the availability of the list to members–to check where they are on the list, etc.–does not obtain. ALJ Decision, p. 12, lines 33-39.

The Union submits that the bottom line here is that Loerwald knew when she removed her phone number on October 14 that she was taking away her means of contact. General Counsel Exhibit 3, p. 3. Her attorney was informed and given a copy of the procedures saying that the phone number needed to be there. General Counsel Exhibit 9. After that time, Loerwald appeared at the Union Hall on 13 occasions and talked to Union people, knowing that her name was not on the OWL, and

never said that she wanted to be re-registered on it, never gave them her phone number, nor ever made any attempt to do the same thing that she has been doing as a Union member for years; rather, she gleefully after her visit told her tape recorder that she had them now. General Counsel Exhibit 8, p. 9. Such game of "gotcha" does not justify a ULP.

Loerwald knew in late November and also by early January that she was not on the OWL. During this period of time, she was in the Union office on numerous occasions. She knew that all she needed to do was tell them while she was in there that she wanted to be in the OWL and give her phone number and she would have been put on the OWL (as happened when she finally did that the next summer).[5] There is a duty on Loerwald to exercise reasonable efforts to mitigate her damages. *The Lorge School*, 2-CA-37967 (Aug. 19, 2010) ("reasonably diligent effort to obtain substantially equivalent employment"); *St. George Warehouse*, 22-CA-23223 (Sep. 30, 2007); *Contractor Services*, 10-CA-28856 (Sep. 27, 2007) (not to punish offender nor to unjustly enrich charging party). In the instant case, it was a matter of utmost simplicity during her numerous visits to the Union hall to have them take

[5]Certainly, in early January when they would not stamp her book, it was because, as she was told, she was not on the OWL, which is a requirement for unemployment. OAC 240:10-3-20(b)(1). Notwithstanding, that her book was not stamped, Loerwald continued to draw her unemployment.

her name and phone number and be on the OWL. It is contrary to law to find a ULP under such circumstances.

PROPOSITION II: The NLRB Decision Should Be Vacated, Not Enforced.

The standard of review over an NLRB order is: the appellate court grants enforcement of an NLRB order when the agency correctly applied the law and its findings are supported by substantial evidence in the record as a whole. In *NLRB v. Velocity Express, Inc.,* 434 F3d 1198 (10th Cir. 2006). Where the above standard has not been met, enforcement is denied. *Colorado-UTE Electric Association, Inc. v. NLRB,* 939 F2d 1392, 1400 (1991). The issues in this proposition were raised in the NLRB and Exceptions to Decision of ALJ and ruled on (without analysis) in its Decision and Order.

As shown in Proposition I above, the factual findings are not based on reason and law. Rather, undisputed evidence (or evidence disputed only by testimony as to the contents of a conversation that was recorded and is in evidence) overcomes the logic utilized by the ALJ and the NLRB and the legal conclusions are incorrect. Accordingly, enforcement of the order should be denied, per *Colorado-UTE Electric Association, supra.*

CONCLUSION

For the foregoing reasons, Petitioner submits that the Decision and Order here under review cannot stand on the facts. This court should rule that the Decision and Order are not in compliance with the law and the facts, should vacate same, and should deny enforcement.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 21st day of April, 2015, a true and correct copy of the above and foregoing was emailed to and was deposited in the United States Mail with the proper postage affixed thereto and addressed to:

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I further certify that there are no required privacy redactions and that this document is an exact copy of the written document being filed with the clerk.

I also certify that this submission has been scanned for virus with the most recent version of Symantec Anti-Virus enterprise Edition, Version 10.1 Gold, dated 5 June, 2006, and, according to the program, it is free of viruses.

/s/Steven R. Hickman
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